

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION  
Nos. 5:03-CR-249-1-BR  
5:12-CV-422-BR

THOMAS ANDREW MILLS

v.

UNITED STATES OF AMERICA

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ORDER

This matter is before the court for initial review of a 28 U.S.C. § 2255 motion pursuant to Rule 4 of the Rules Governing Section 2255 Proceedings.

In December 2003, a jury found petitioner guilty of one count of being a felon in possession of a firearm. In May 2004, the court sentenced petitioner to 180 months imprisonment. Petitioner appealed, and the Fourth Circuit Court of Appeals affirmed and subsequently denied petitioner's petition for rehearing. (DE ## 37, 40.) In October 2005, the Supreme Court denied a petition for writ of certiorari.

In November 2005, petitioner filed *pro se* a § 2255 motion, raising claims of ineffective assistance of counsel, among others. (DE # 44.) After directing the government to respond to the motion, the court granted in part and denied in part the government's motion to dismiss. (DE # 57, at 4.) The court allowed petitioner's claims of ineffective assistance of counsel and incompetency to proceed. (*Id.* at 2, 4.) Thereafter, in December 2007, the court granted the government's motion for summary judgment and dismissed the § 2255 motion. (DE # 73, at 7.)

On 11 July 2012, petitioner, with the assistance of counsel, filed the instant § 2255 motion. Petitioner's sole claim is that he is actually innocent of being a felon in possession of a firearm because, pursuant to United States v. Simmons, 649 F.3d 237 (4<sup>th</sup> Cir. 2011) (en banc),

he has not previously been convicted of any crimes punishable by a term of imprisonment of more than one year, and he seeks vacation of his conviction in this court. (Mem., DE # 80-2.)

The court finds that petitioner must obtain certification from the Fourth Circuit Court of Appeals before filing the instant § 2255 motion. As set forth in 28 U.S.C. § 2255(h),

[a] second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

If pre-filing authorization is not obtained when required by this provision, the district court lacks jurisdiction to consider the § 2255 motion. See United States v. Winestock, 340 F.3d 200, 205-06 (4<sup>th</sup> Cir. 2003) (recognizing that the district court lacks jurisdiction in the absence of pre-filing authorization to consider entire habeas corpus application which contains any abusive or repetitive claims). “While ‘it is settled law that not every numerically second [§ 2255 petition] is ‘second or successive’ within the meaning of the [Antiterrorism and Effective Death Penalty Act of 1996],’ second petitions challenging the same conviction and sentence based on a subsequent change in substantive law are deemed to be successive and require authorization from the court of appeals in order to be filed.” Bryant v. United States, No. 2:03-CR-1-BO, 2012 WL 2236984, at \*1 (E.D.N.C. June 15, 2012) (citations omitted, alterations in original). Because petitioner has previously challenged his conviction and sentence via § 2255; the court dismissed that initial challenge on the merits; and petitioner now challenges via § 2255 that same conviction based on a change in the substantive law, that is, Simmons, he must seek authorization to file this second §

2255 motion. See id. at \*1-2 (dismissing second § 2255 motion which raised a Simmons claim where petitioner had filed earlier a § 2255 motion claiming prosecutorial misconduct and ineffective assistance of counsel).

The § 2255 motion is DISMISSED WITHOUT PREJUDICE. The court finds that petitioner has made a substantial showing of the denial of a constitutional right and hereby ISSUES petitioner a certificate of appealability as to the issue of whether the § 2255 motion qualifies as a second or successive motion for purposes of 28 U.S.C. § 2255(h). See id. at \*2 (granting a certificate of appealability “as to a review of the preliminary procedural question of the finding that the petition is second or successive”).

This 20 August 2012.

A handwritten signature in green ink, appearing to read "W. Earl Britt", is written over a horizontal line.

W. Earl Britt  
Senior U.S. District Judge